FILE COPY

Supreme Court, U.
FILED
NOV 9 1948
CHARLES ELMORE CROPLEY
CLERK

No. 218

In the Supreme Court of the United States

October Term, 1948.

HUGH HENDERSON, BY J. WILLARD GRAGG, NEXT FRIEND, *Petitioner,*

vs.

SHELL OIL COMPANY, INCORPORATED, *ET AL., Respondents.*

BRIEF AND ARGUMENT OF SHELL OIL COMPANY, INCORPORATED, IN OPPOSITION TO PETITION FOR WRIT OF *CERTIORARI.*

GEO. W. CUNNINGHAM,
Box 1191,
Tulsa 2, Oklahoma,
Attorney for Respondent, Shell Oil Company, Incorporated.

Of Counsel:

JOHN H. KILGORE,
510 Gulf States Building,
Dallas 1, Texas;

JESSE M. DAVIS,
Box 1191,
Tulsa 2, Oklahoma.

INDEX.

PAGE

Supplemental statement of the case 1
Summary of petitioner's argument 2
Summary of this respondent's argument 3
Argument 5

POINT I. *Since the courts of Texas had jurisdiction of petitioner's person as well as of his estate, his petition for writ of certiorari does not raise any Federal question* 5

a. The fact that petitioner was present in the County Court of Clay County, Texas, at the time the guardian of his Texas estate was appointed in 1939 was sufficient to comply with the due process provision of the Fourteenth Amendment, even in a personal action 6

b. Under the laws of Texas petitioner's voluntary appearance in the District Court, wherein he was granted a trial *de novo*, cured any lack of service of process in the County Court 7

POINT II. *The Texas statute which provides for the determination of the insanity of a nonresident person for the purpose of appointing a guardian of his Texas estate does not contravene the due process provision of the Fourteenth Amendment* 9

a. A proceeding brought for the appointment of a guardian of the Texas estate of a nonresident person of unsound mind is an action *in rem* or *quasi in rem* and constructive service constitutes due process of law 11

POINT III. *Upon the filing of the petition for the appointment of a guardian the County Court of Clay County, Texas, acquired jurisdiction of petitioner's Texas estate* 23

Conclusion 25

APPENDIX: Petitioner's authorities do not support his contention 26

TABLE OF CASES.

PAGE

Appeal of Karmany, 242 Pa. 300, 89 Atl. 84.....20, 38
Beeler v. Beezley, 126 Kan. 268, 267 Pac. 1112..... 34
Blinn v. Nelson, 222 U. S. 1, 56 L. ed. 65.....4, 14
Chaloner v. Sherman, 242 U. S. 455, 61 L. ed. 427....3, 9-10
Coker v. Gay, 154 Ga. 337, 114 S. E. 217.....20, 22
Coleman v. Cravens, et al., 41 Wash. 1, 82 Pac. 1005... 19
Cook v. Dougherty, (Ct. App. D. C.) 32 F. (2d) 839.... 7
Cooper v. Burton, (Ct. App., D. C.) 127 F. (2d) 741..22, 33
Crohn v. Modern Woodman of America, 145 Mo. App. 158, 129 S. W. 1069..... 20
Cunnius v. Reading School District, 198 U. S. 458, 49 L. ed. 1125 .....4, 14, 24
Evans v. Johnson, 39 W. Va. 299, 19 S. E. 623..... 33
Ex parte Southcote, 1 Amb. 109, 27 Eng. Rep. 71....16, 22
Federal Trust Co. v. Allen, 110 Kan. 484, 204 Pac. 747.. 34
Finley v. Hartsook, (C. C. A. 5) 158 F. (2d) 618..... 20
Glass v. Smith, 66 Tex. 548, 2 S. W. 195..... 3, 7
Griffin v. Larwell, 148 Mich. 516, 111 N. W. 1089..... 20
Grinbaum v. Superior Court, 192 Cal. 548, 221 Pac. 635 .....23, 29
Gronifer v. Puymirol, 19 Cal. 629..... 30
Hansell v. Hansell, 44 La. Ann. 548, 10 So. 941..... 36
Hawkins v. Tiger, 163 Okl. 55, 20 P. (2d) 578..... 31
Heavey v. Castles, (Civ. App.) 12 S. W. (2d) 615..... 8
Henderson v. Shell Oil Co., Inc., (Tex. Sup.) 202 S. W. (2d) 492 .....12, 20, 26
Henry v. Edde, 148 Kan. 70, 79 P. (2d) 888..... 35
Hughes v. Jones, 116 N. Y. 67, 22 N. E. 446..... 15
Hundley v. Sumrall, 144 Ky. 73, 137 S. W. 842.....14, 20
In re Allie Walters Sacks, (Calif.) 190 P. (2d) 602.... 30
In re Burges' Estate, (San Antonio Ct. of Civ. Ap.) 148 S. W. (2d) 903..... 26
In re Dalrymple, 163 N. Y. S. 233..... 18
In re Devausney, 56 N. J. Eq. 502, 28 Atl. 459..... 18
In re Edgerly, 82 Minn. 96, 84 N. W. 653.....20, 38
In re Hendrickson, 40 S. D. 211, 167 N. W. 172..... 20
In re Lanwarne, 30 W. R. 759, 46 L. T. 668..... 16

PAGE

In re Paddock, (Ct. App. N. Y.) 97 N. E. 1111.....9, 18
In re Prokosch's Guardianship, 128 Minn. 324, 151 N. W. 130 15
In re Ryan, 40 N. Y. S. (2d) 594..... 18
In re Sall, 59 Wash. 539, 110 Pac. 32..... 20
In re Skinner's Guardianship, 230 Iowa 1016, 300 N. W. 1 28
In re Wilson, (Ct. of Chan. of Dela.) 82 Atl. 695.....19, 22
In the Matter of Child, 16 N. J. Eq. 498.....18, 22
Jones v. Prairie Oil and Gas Co., 273 U. S. 195, 71 L. ed. 602 .....4, 13, 31
Josephberg, et al., v. Markham, (C. C. A. 2) 152 F. (2d) 644 20
Lackey v. Lackey, 8 B. Monroe 107, 47 Ky. 107..... 6
Martin v. White, (C. C. A. 9) 146 Pac. 461..... 31
Matter of Perkins, 2 Johns. Ch. 124, 1 N. Y. Ch. Rep. (L. ed.) 317 16
McCormick v. Blaine, 345 Ill. 461, 178 N. E. 195..... 20
McKinley v. Salter, (Civ. App. Tex.) 136 S. W. (2d) 615 .....15, 16
McElroy v. Pegg, (C. C. A. 10) 167 F. (2d) 668..... 31
McMullin v. Commonwealth, etc., 261 Pa. 574, 104 Atl. 760 38
Minnesota v. Probate Court, 309 U. S. 270, 84 L. ed. 744 38
Morrissey v. Rodgers, 137 Kan. 626, 21 P. (2d) 359.... 34
Neal v. Bartleson, 65 Tex. 478 20
Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565.....24, 26
Perry v. McKinzie, 4 Tex. 154..... 8
Perry v. Rohde, 20 Tex. 730..... 3, 8
Raher v. Raher, 150 Iowa 511, 129 N. W. 494..... 27
Redmon v. Leach, (Civ. App. Dallas, Tex.) 130 S. W. (2d) 873 .....23, 26
Re Ganse, a Lunatic, 9 Paige Ch. 416, 4 N. Y. Ch. Rep. L. ed.) 756 .....17, 22
Re Petit, a Lunatic, 2 Paige 174, 2 N. Y. Ch. Rep. (L. ed.) 861 16

TABLE OF CASES—Continued.

PAGE

Re Russell, a Lunatic, 1 Barb. Ch. 38, 5 N. Y. Ch. Rep. (L. ed.) 290 17
Ross v. Wilson, 95 Okl. 262, 218 Pac. 682 31
Sacks v. Superior Court, 79 Cal. App. (2d) 806, 180 P. (2d) 922 30
Sheldon v. San Antonio, 25 Tex. Supp. 177 8
Shroyer v. Richmond, 16 Oh. St. Rep. 455, 465 15
State v. Servier, 136 La. 45, 66 So. 392 37
Thomason v. McGeorge, (Com. App.) 285 S. W. 285 .. 8
Wallace v. Tinney, 145 Ia. 478, 122 N. W. 936 .....20, 27
Western Life Indem. Co. v. Rupp, 235 U. S. 261, 59 L. ed. 220 8
Whittelsey v. Conniff, 266 Mo. 567, 182 S. W. 161, 1 A. L. R. 913 15
Wilson v. Fisher, (Civ. App.) 105 S. W. (2d) 304 8
Wootters v. Wynne, (Civ. App. Tex.) 7 S. W. (2d) 940 ..4, 23
York v. Texas, 137 U. S. 15, 34 L. ed. 604 8

Text Books.

American Law of Guardianship by Woerner, p. 441, Sec. 134 21
American and English Enc. of Law, Vol. 16, pp. 577-578, Sec. 9 21
Amer. Juris., Vol. 25, p. 21 21
Amer. Juris., Vol. 42, p. 71 12
Corpus Juris, Vol. 32, p. 653 21
Corpus Juris, Vol. 12, p. 1233 6
Corpus Juris, Vol. 34, p. 1172 12
Corpus Juris Secundum, Vol. 16, pp. 1246-1247 ...4, 12, 13
Corpus Juris Secundum, Vol. 39, p. 36 16
Conflict of Laws by Beale, Vol. 2, p. 658, Sec. 120.9 20
Rights, Remedies and Practice, by Lawson, Vol. 2, Sec. 848, "Guardians of Lunatics" 21
Ruling Case Law, Vol. 14, p. 570, Sec. 21 21

STATUTES.

	PAGE
Alaska Code, Sec. 911	22
Calif. Code of Civ. Proc. 1923, Sec. 1793	22, 30
Code of Civil Procedure of New York 1898, Sec. 2323	9
Code of Iowa 1939, Sec. 12605	22
Kan. Gen. Stats. 1935, Sec. 39-241	35
1947 Kansas Supp. to Gen. Stats. of 1935, Sec. 59-1803	22, 36
Minn. Stats. 1941, Sec. 525.55	22, 38
Mo. Stats. Ann., Secs. 386 and 482	20
Okla. Stats. 1941, Title 58, Sec. 861	22, 31
Tex. Rev. Civ. Stats., Art. 4132	10, 22
Texas Rules of Civil Procedure, Rule 350	7

IN THE SUPREME COURT OF THE UNITED STATES.
October Term, 1948.

No. 218

HUGH HENDERSON, BY J. WILLARD GRAGG, NEXT FRIEND, *Petitioner,*

vs.

SHELL OIL COMPANY, INCORPORATED, *ET AL.*, *Respondents.*

BRIEF AND ARGUMENT OF SHELL OIL COMPANY, INCORPORATED, IN OPPOSITION TO PETITION FOR WRIT OF *CERTIORARI.*

May It Please the Court:

Supplemental Statement of the Case.

The District Court in the judgment appealed from found that on March 6, 1908, petitioner, Hugh Henderson, was adjudicated to be a person of unsound mind by a court of competent jurisdiction in Pike County, Missouri, and that on the following day he was incarcerated in the state insane asylum at Fulton, Missouri, where he remained for twelve years, or until August 4, 1920 (R. 35). There was no evidence of his restoration to sanity by a proper Missouri court. While petitioner was still in the insane asylum, to-wit, on December 18, 1918, M. L. Henderson was appointed guardian of his Texas estate (R. 35) on statutory notice by publication (R. 52-53, 46). Some question having arisen

as to the validity of the 1918 guardianship proceedings, on April 17, 1939, pursuant to statutory posting notice (R. 57-58, 46), and personal notice to Hugh Henderson in Pike County, Missouri (R. 58-59), M. L. Henderson was again appointed guardian of the Texas estate of Hugh Henderson on the ground he was a person of unsound mind (R. 59-61). The two guardianship proceedings were consolidated (R. 60). Hugh Henderson came from Missouri to Texas and was present in the courtroom at the time he was declared insane and a guardian was appointed in the 1939 proceedings. The order appointing M. L. Henderson guardian recited "came also Hugh Henderson in person" (R. 60, 46). Three years later petitioner, acting through his next friend, filed a petition for certiorari in the District Court of Clay County, Texas (R. 1-7), wherein he was granted a trial de novo in the guardianship proceeding (Rule 350, Texas Rules of Civil Procedure). After hearing the evidence the District Court found the petitioner was a person of unsound mind and affirmed the appointment of a guardian of his Texas estate (R. 33-38). It is this District Court order that was affirmed by the Ft. Worth Court of Civil Appeals (R. 71) and by the Supreme Court of Texas (R. 94-95). (*All emphasis has been supplied by us.*)

Summary of Petitioner's Argument.

Summarizing petitioner's argument, he contends:

A. That the courts of Texas are without power to appoint a guardian for a nonresident person of unsound mind and as an incident thereto to determine the fact of insanity. (Specification of Error A, brief 17.)

B. That if the courts of Texas have such power the action is *in personam* and personal service of process is necessary. (Specifications of Error C and D, brief 17.)

C. That if constructive service is sufficient there must be a prior seizure of the property. (Specification of Error B, brief 17.)

Summary of This Respondent's Argument.

Petitioner's contentions are not supported by either the facts or the law. The record does not sustain his assumption of facts and every Federal question raised by him has heretofore been decided against his contention by this Court.

POINT I: Petitioner's petition does not raise *any* Federal question because the County Court order appointing a guardian of his Texas estate recites *petitioner was present in the county courtroom* in Clay County, Texas, in 1939, at the time he was determined to be insane and the guardian of his estate was appointed (R. 60, 46). *This personal appearance was sufficient to give the County Court jurisdiction of petitioner's person,* if that be required. Likewise, the District Court expressly found it had jurisdiction of petitioner's person (R. 37) and *that finding of fact stands unassailed in this Court.* Petitioner voluntarily invoked the jurisdiction of the District Court, wherein he was granted a *trial de novo,* and his appearance in that court constituted a general appearance and cured any lack of service in the County Court. *Glass* v. *Smith,* 66 Tex. 548, 2 S. W. 195; *Perry* v. *Rohde,* 20 Tex. 730.

POINT II: *Chaloner* v. *Sherman,* 242 U. S. 455, 61 L. ed. 427, is a complete answer to petitioner's Specification of Error A (brief 17). In that case, *this Court upheld the constitutionality of a New York statute similar to the Texas statute under attack* and approved a determination of incompetency and the appointment of a guardian of a nonresident person who *had not* been adjudicated incompetent

in the state of his residence. Specifications of Error C and D (brief 17) are fully answered by *Jones* v. *Prairie Oil and Gas Company,* 273 U. S. 195, 71 L. ed. 602, wherein this Court held that the appointment of a guardian on constructive notice does not violate the due process provision of the Fourteenth Amendment; and by *Cunnius* v. *Reading School District,* 198 U. S. 458, 49 L. ed. 1125, and *Blinn* v. *Nelson,* 222 U. S. 1, 56 L. ed. 65, wherein this Court held *the appointment of an administrator of the estate of a living adult absentee on constructive notice does not violate the due process provision of the Fourteenth Amendment.* In the case at bar the Texas Supreme Court held that, under the laws of that state, a proceeding for the appointment of a guardian of a nonresident person of unsound mind is *an action in rem or quasi in rem* (R. 92). Personal service of process is not required in an action in rem or quasi in rem. 16 C. J. S. 1246-1247.

Point III: Petitioner's contention in Specification of Error B (brief 17) that there must be a prior seizure of property is answered by *Wootters* v. *Wynne,* (Civ. App. Tex.), 7 S. W. (2d) 940 (no writ), holding that *upon the filing of a petition* for the appointment of a guardian *the County Court obtains jurisdiction of the property* of the ward within the state, and also by *Cunnius* v. *Reading School District,* 198 U. S. 458, 49 L. ed. 1125, *supra,* wherein this Court overruled a similar contention made by the petitioner in that case. Filing of the petition constituted a seizure of the property.

ARGUMENT.

POINT I.

Since the courts of Texas had jurisdiction of petitioner's person as well as of his estate, his petition for writ of *certiorari* does not raise any Federal question.

The record in this case does not even support petitioner's erroneous interpretation of the law. He contends that the courts of Texas could not appoint a guardian for Hugh Henderson's Texas estate without a prior adjudication of insanity in Missouri *or* without jurisdiction of his person (brief 17). The record shows that not one, but both of these facts were present in this case, and for that reason no constitutional question is involved even under petitioner's mistaken theory of the law. The District Court found that on May 6, 1908, while a resident of Pike County, Missouri, Hugh Henderson was duly adjudicated to be a person of unsound mind and that thereafter he spent twelve years in the insane asylum at Fulton, Missouri (R. 35). There is no evidence showing his restoration to sanity. There was therefore a continuing presumption of insanity. This finding of fact by the District Court is not attacked in petitioner's application for writ of certiorari in this Court.

Petitioner's alternative requirement is that if there had not been a prior adjudication the courts of Texas must have had jurisdiction of Hugh Henderson's person. They did. While, as we shall hereafter show, an action for the appointment of a guardian of the estate of a nonresident person of unsound mind is an action in rem or quasi in rem and constructive service is sufficient, nevertheless both the County Court and the District Court of Clay County, Texas, actually had jurisdiction of petitioner's person.

a. ***The fact that petitioner was present in the County Court of Clay County, Texas, at the time the guardian of his Texas estate was appointed in 1939 was sufficient to comply with the due process provision of the Fourteenth Amendment, even in a personal action.***

Prior to the appointment of the guardian in 1939, notice was given by posting (R. 57-58) and another notice was personally served on Hugh Henderson in Missouri (R. 58-59). We concede that this out of state notice was constructive in its nature. Nevertheless, it was an effective notice, as evidenced by the fact that Hugh Henderson came to Texas and was present in the courtroom at the time the County Court found he was a person of unsound mind and appointed a guardian of his Texas estate. The order appointing the guardian states: *"and came also Hugh Henderson in person."* (R. 60) This personal appearance at the time and place of the hearing complied with the due process provision of the Fourteenth Amendment, even to the extent of permitting a personal judgment against him. 12 C. J. 1233. This rule has been applied to a proceeding for the adjudication of insanity and appointment of a committee for the *person and estate* of a person of unsound mind. *Lackey* v. *Lackey,* 8 B. Monroe 107, 47 Ky. 107. In that case *no notice whatever was given* to the defendant, but, in holding that *his appearance was sufficient,* the court said:

> " • • • Where, however, the defendant is brought into court, and the inquest held in open court, neither notice or writ is necessary. Persons of unsound mind are under the protective care of the chancellor, whose duty it is to watch over and guard their interest scrupulously. Being in court, the presumption is, this duty was discharged, and the court satisfied of the propriety of holding an inquest, without any affidavit setting forth facts to authorize the proceeding." (pp. 107-108)

This rule has even been applied to an adjudication of in-

sanity for the purpose of commitment to an insane asylum. *Cook* v. *Dougherty*, (Ct. App. D. C.) 32 F. (2d) 839.

While there are a few cases holding that personal service is necessary even when an insane person appears at the hearing, each of these cases is based upon the interpretation of a statute which expressly required personal service. *None of them hold that notice sufficient to bring the insane person into the courtroom at the time of the hearing does not constitute due process of law under the Fourteenth Amendment.*

b. *Under the laws of Texas petitioner's voluntary appearance in the District Court, wherein he was granted a trial de novo, cured any lack of service of process in the County Court.*

The District Court expressly found it had jurisdiction of petitioner's person (R. 37). *This finding was not attacked in either of the state appellate courts and is not attacked in this court.* Petitioner filed a petition for writ of certiorari in the District Court (R. 1-7) wherein he was allowed a *trial de novo* in the guardianship proceeding.[1] The filing of this petition constituted a general appearance and, if jurisdiction of the person be necessary, *the District Court had jurisdiction of his person* as well as of his estate. *Glass* v. *Smith*, 66 Tex. 548, 2 S. W. 195. Therein the Supreme Court of Texas said:

> "* * * A court acquires jurisdiction over a plaintiff by his voluntary submission of a real or supposed cause of action to its determination; and, in this respect, one who institutes proceedings for the purpose of having reviewed by another court some proceedings

1. Rule 350, Texas Rules of Civil Procedure, under heading, "Certiorari to County Court," provides: "The cause shall be *tried de novo* in the District Court, but the issues shall be confined to the grounds of error specified in the application for the writ. The judgment shall be certified to the County Court for observance."

had in an inferior court, is held thus to give to the court, exercising appellate or revisory power, *jurisdiction over his person.* * * *" (pp. 195-196)

In *Perry* v. *Rohde,* 20 Tex. 730, it was held that a defendant who was not properly cited in the justice court, but who filed a petition for certiorari in the County Court, *conferred jurisdiction on the County Court to enter a personal judgment on a trial de novo.* See also *Perry* v. *McKinzie,* 4 Tex. 154; *Sheldon* v. *San Antonio,* 25 Tex. Supp. 177; *Wilson* v. *Fisher,* (Civ. App.) 105 S. W. (2d) 304; *Heavey* v. *Castles,* (Civ. App.) 12 S. W. (2d) 615 (writ refused); and *Thomason* v. *McGeorge,* (Com. App.) 285 S. W. 285.

The courts of Kentucky, like Texas, treat the appearance of a party in the appellate court where a *trial de novo* is had as curing lack of service of process in the courts below, and, in *Western Life Indemnity Company* v. *Rupp,* 235 U. S. 261, 59 L. ed. 220, this Court held that such practice does not violate the due process clause of the Fourteenth Amendment. Likewise, in *York* v. *Texas,* 137 U. S. 15, 34 L. ed. 604, this Court held that a *personal judgment* rendered on a *void out of state service* of process was valid where the defendant made a special appearance to attack the court's jurisdiction, since under the laws of Texas such special appearance constitutes a general appearance for all purposes and gave the court jurisdiction of defendant's person. It was held that such law did not violate the Fourteenth Amendment.

Petitioner contends either (*1*) there must be a prior adjudication of insanity *or* (*2*) there must be jurisdiction of the person. We submit that even under petitioner's erroneous interpretation of the law both requirements were present and that therefore no constitutional question exists in this case.

Point II.

The Texas Statute which provides for the determination of the insanity of a nonresident person for the purpose of appointing a guardian of his Texas estate does not contravene the due process provision of the Fourteenth Amendment.

Petitioner contends that the courts of Texas were without power to adjudicate Hugh Henderson insane as an incident to the appointment of a guardian of his Texas estate and that the statute authorizing such appointment violates the Fourteenth Amendment. (Specification of Error A, brief 17.)

Section 2323, Code of Civil Procedure of New York (1898), is similar to the Texas statute which petitioner attacks. The New York statute provides for the appointment of a committee of the estate of a nonresident incompetent. *In re Paddock,* (Ct. App. N. Y.) 97 N. E. 1111, involved the constitutionality of this statute. In answer to the following certified question:

> "(1) Is Section 2323 of the Code of Civil Procedure violative of the state or Federal Constitution in so far as it permits the maintenance of an incompetency proceeding against a nonresident of the state having property situate in the state?"

the Court of Appeals of New York held that the statute did not violate either the State or the Federal Constitution. The constitutionality of this *identical statute* was likewise sustained by this Court in *Chaloner* v. *Sherman,* 242 U. S. 455, 61 L. ed. 427. Chaloner was a resident of Virginia and had *not* been adjudicated incompetent by a court of that state, but nevertheless this Court in holding that the courts of New York had jurisdiction to determine the insanity of

this nonresident for the purpose of appointing a committee of his estate said:

> "As the plaintiff had notice and opportunity to be heard at each stage of these proceedings, the essential elements of due process of law were fully met, and *the court had jurisdiction to enter that order.* * * *" (p. 461)

There is no substantial difference in the facts involved in the *Chaloner* case and in the case at bar, except that there had been no prior adjudication by a Virginia court in the *Chaloner* case, whereas a Missouri court had declared Hugh Henderson insane in 1908 (R. 35). Chaloner was in the State of New York at the time he was adjudicated incompetent and a committee appointed and was personally served, although such personal service was not required by the statute. Likewise, Hugh Henderson was personally served in Missouri, although such personal service was not required by the statute. Concededly, this out of state service on Hugh Henderson was effective only as a constructive service. However, it had the desired result since it brought Hugh Henderson to Texas and he was present in the courtroom at the time he was found to be insane and the guardian of his Texas estate was appointed. (R. 60) On the other hand, Chaloner was not present in the courtroom when he was adjudicated insane and the committee was appointed for his estate. The *Chaloner* case does not discuss the question of whether constructive service is sufficient in a guardianship proceeding. We will submit other authorities on that point. However, the *Chaloner* case does expressly hold that a statute similar to Article 4132, Revised Texas Statutes, providing for the adjudication of insanity of a nonresident person and the appointment of a guardian of his Texas estate, does not violate the Federal Constitution.

a. *A proceeding brought for the appointment of a guardian of the Texas estate of a nonresident person of unsound mind is an action in rem or quasi in rem and constructive service constitutes due process of law.*

Petitioner's primary contention appears to be that the Courts of Texas could not appoint a guardian for his Texas estate without obtaining personal service upon him (brief 17). The mere statement of this proposition reveals its impracticability. Being a nonresident, it was impossible to obtain personal service upon him in the State of Texas. Under petitioner's theory his Texas land must remain without a manager of any type. Petitioner being insane, he could not make contracts relating thereto; his Missouri guardian had no jurisdiction outside the State of Missouri; and any process issued from a Texas court is ineffective outside that state's borders. This means that during the past 30 years Hugh Henderson's Texas land could not have been leased by anyone for agricultural or any other purpose. This cannot be the law, and, as we shall now show, it is not the law.

Herein we shall assume, arguendo, there was no prior adjudication of insanity in Missouri and no jurisdiction of petitioner's *person* by either the County Court or the District Court of Clay County, Texas. Petitioner's entire argument is based on the theory that a proceeding for the appointment of a guardian is an insanity hearing. Such is not the case. While insanity is one of the facts which must be determined, *the primary purpose of the action is to appoint a guardian of the estate of the nonresident person of unsound mind.*

The Court of Civil Appeals, in its opinion in this case (R. 71) 202 S. W. (2d) 492, very concisely states the basic error in petitioner's argument in the following language:

"The basic error in appellant's contentions, both as to the jurisdiction of the Texas court to appoint a guardian and as to the question of personal service on Hugh Henderson, is the failure to treat the guardianship as a proceeding *in rem* rather than as a proceeding in personam. *The primary purpose of the guardianship proceeding was* not to have the County Court of Clay County adjudge the status of the nonresident Hugh Henderson, but *to have that court exercise control of property lying within its jurisdiction.*" (R. 77)

In its opinion in this present case the Supreme Court of Texas said:

"It is our further view that due process within the meaning of the 14th Amendment to the Constitution of the United States was observed in the proceeding. *Jones* v. *Pairie Oil Co.*, 273 U. S. 195; *McKinley* v. *Salter* (Civ. App.), 136 S. W. (2d) 615 (writ dismissed, correct judgment). *Such a proceeding is one in rem or quasi in rem. McCormick* v. *Blaine,* 178 N. E. 195, 77 A. L. R. 1215; *Re Sall,* 59 Wash. 539, 140 Am. St. Rep. 885; *Wallace* v. *Tinney,* (Iowa) 122 N. W. 936. *In a proceeding of that nature the court may acquire jurisdiction by means of substituted or constructive service. Pennoyer* v. *Neff,* 95 U. S. 714; *Re Sall, supra;* case note 77 A. L. R. 1227. A contrary holding would have the effect of depriving the courts of this State of control over lands situated within its borders." (R. 92)

The question of whether or not in Texas the appointment of a guardian for a nonresident person of unsound mind is an *in rem* or *quasi in rem* action is important for the reason that *personal service of process is not required in an action in rem or quasi in rem.* 34 C. J. 1172; 42 Am. Jur. 71.

"• • • a valid judgment in rem, or quasi in rem, may be rendered which will be binding on property within the jurisdiction of the court without personal service of

process, substituted or *constructive service being sufficient to constitute due process in such cases.* • • •" (16 C. J. S. 1246-7)

Since the guardianship proceedings concerned petitioner's Texas property and nothing more, under the laws of Texas such proceedings were in rem or quasi in rem and constructive service complied with the due process provision of the Fourteenth Amendment.

In *Jones* v. *Prairie Oil & Gas Company*, 273 U. S. 195, 71 L. ed. 602, in holding that the appointment of a guardian for a minor on *constructive notice* did not violate the due process provision of the Fourteenth Amendment, this Court said:

"• • • The Oklahoma statutes only require such notice as the judge deems reasonable to be given to the relatives residing in the county and to any person having the care of such minor. Okla. Comp. Stat. 1921, Sec. 1431. In the circumstances stated, unqualified, the requirement of notice is merely formal, if it exists. *Lester* v. *Smith*, 83 Okl. 143, 200 Pac. 780; *Gibson's Appeal*, 154 Mass. 378, 379-381, 28 N. E. 296. *Certainly there is nothing in the Constitution of the United States that requires it.* • • •" (p. 198)

Petitioner attempts to distinguish this case on the ground that it involved the appointment of a guardian of an admitted minor. Likewise, the case at bar involves the appointment of an admitted insane person, but the question now under discussion is not whether a particular person is an admitted minor or an admitted insane person, but what type of notice is required to appoint a guardian. The Fourteenth Amendment applies to minors as well as to adults. If personal service is necessary before appointing a guardian for a person of unsound mind, then we submit that personal service is necessary before appointing a guardian of

a minor. As was said by the Court of Appeals of Kentucky in *Hundley* v. *Sumrall,* 144 Ky. 73, 137 S. W. 842:

> "We do not see that the case of a lunatic can be distinguished from that of an infant." (2 c. 844)

Petitioner makes no attempt to distinguish *Cunnius* v. *Reading School District,* 198 U. S. 458, 49 L. ed. 1125, and *Blinn* v. *Nelson,* 222 U. S. 1, 56 L. ed. 65. These two cases *did not involve minors.* Each case involved an *adult nonresident,* but nevertheless this Court held that the appointment of an administrator for the estate of these living adult absentees *on publication notice did not violate the Fourteenth Amendment.* Cunnius, who had resided in California for more than seven years, returned to Pennsylvania and sued the Reading School District to recover money paid by it to the administrator. In holding that *publication notice was sufficient and that the statute did not violate the Fourteenth Amendment,* this Court said:

> "• • • As it cannot be denied that, in substance, the Pennsylvania statute is *a special proceeding* for the administration of the estates of absentees, distinct from the general law of that state providing for the settlement of the estates of deceased persons, and as, by the express terms of the statute, jurisdiction was conferred upon the proper court to grant the administration, it follows that the Supreme Court of Pennsylvania *did not deprive the plaintiff in error of due process of law within the intendment of the 14th Amendment.* • • • (p. 476)
>
> • • • • • • • •
>
> "• • • Let it be further conceded, as we also think is essential, that a state law which did not provide adequate notice as prerequisite to the proceedings for the administration of the estate of an absentee would also be repugnant to the 14th Amendment. • • • So far as

the *notices* which it directs to be issued, we think they *were reasonable.* * * *" (p. 477)

The notices which this Court held "were reasonable" were publication notices. See also *McKinley* v. *Salter,* (Civ. App.) 136 S. W. (2d) 615, (writ dismissed—judgment correct) wherein it was held the appointment of a temporary guardian without notice did not violate the Fourteenth Amendment. This Court dismissed the appeal "for want of a substantial Federal question." 312 U. S. 659, 85 L. ed. 1106.

We do not see how petitioner can contend an act providing for the appointment of a guardian for a nonresident sane person on constructive notice is valid but that a different rule is applicable to a nonresident insane person. We respectfully submit that since the appointment of a guardian of the estate of a minor or an absentee *adult sane* person on constructive notice does not violate the Fourteenth Amendment, the appointment of a guardian of the estate of a nonresident person of unsound mind on constructive service is constitutional. The cases which we shall hereafter discuss so hold.

Our discussion is limited to *guardianship of estates* and cases relating to guardianships of persons are not apropos. The reasoning back of all cases providing for the appointment of a *guardian of the estate* of a minor or of a person of unsound mind on constructive notice is that the appointment of a guardian is not an adversary proceeding but partakes of the nature of an action by the state in its character of parens patriae; that it does not take the ward's property, but uses it for his benefit. *In re Prokosch's Guardianship,* (1915) 128 Minn. 324, 151 N. W. 130; *Shroyer* v. *Richmond,* (1866) 16 Oh. St. Rep. 455, 465; *Hughes* v. *Jones,* (1899) 116 N. Y. 67, 22 N. E. 446; *Whittelsey* v.

Conniff, 266 Mo. 567, 182 S. W. 161, 1 A. L. R. 913; *McKinley* v. *Salter*, (Civ. App. Tex.) 136 S. W. (2d) 615 (writ dismissed—judgment correct); 39 C. J. S. 36.

In 1751, nearly 200 years ago, this question was first submitted to the courts of England, and it was held that a commission of lunacy could issue against a person *residing in France. Ex Parte Southcote*, 1 Amb. 109, 27 Eng. Rep. 71. While the type of notice is not shown, it necessarily was constructive. *Such was the statuts of the common law when it became the basic law of the United States.* This case has been cited innumerable times by the courts of this country. It has also been followed by the English courts. *In re Lanwarne*, 30 W. R. 759, 46 L. T. 668, is another English case involving the lunacy of an alleged lunatic residing abroad. The court made an order dispensing with the presence of the lunatic and *notice was given by a registered letter.*

The first reported case we have been able to find in the United States on this point was decided in 1816. *Matter of Perkins*, 2 Johns. Ch. 124, 1 N. Y. Ch. Rep. (L. ed.) 317. Therein the New York court stated:

> "• • • It is, at least, sufficient to warrant the issuing a commission; and there is no doubt, from the case *Ex parte Southcote*, Amb. 109, that a commission of lunacy may issue against a person resident abroad." (2 c. 317)

The *Perkins* case involved a person who had already been adjudicated insane in the state of his residence, but the New York court held it could not recognize that adjudication but would have to make its own.

The next case in point of time was decided in 1830. *Re Petit, a Lunatic*, 2 Paige 174, 2 N. Y. Ch. Rep. (L. ed) 861. The alleged lunatic was a resident of Connecticut and *there had been no prior adjudication of insanity.* The court

ordered that a commission to determine the question of insanity and necessity for a committee of his New York estate should issue in the New York county closest to his Connecticut residence, *on out of state notice.*

The *Perkins* and *Petit* cases were followed in 1842 by *Re Ganse, a Lunatic,* 9 Paige Ch. 416, 4 N. Y. Ch. Rep. (L. ed) 756. In this case the exact whereabouts of the alleged lunatic was unknown and the question before the court was whether it could issue a commission of lunacy for the purpose of appointing a committee of his estate without some evidence that the lunatic was within the jurisdiction of the court. In determining that it could the court said:

> "* * * It was at one time questioned whether the Lord Chancellor of England could issue a commission where the lunatic was abroad. But since the decision of Lord Hardwicke, in *Southcote's* case, 2 Ves. Sr. 402, *there can be no doubt of the right of the chancellor to issue a commission, where the lunatic has lands within his jurisdiction, although the lunatic is himself domiciled abroad.* And the cases of *Perkins* (2 Johns. Ch. 124) and of *Petit* (2 Paige 174) established the same principle here. * * *" (1 c. 757)

In determining that notice to the lunatic could be given *by mail,* the court said:

> "A commission must issue accordingly, as prayed in the petition, and must be executed in the town of Fishkill; * * * *The commissioners must also direct a similar notice to be transmitted to Ganse himself, through the postoffice,* directed to him at Batavia, at least twenty days previous to the time when the commission is to be executed." (1 c. 757)

Re Russell, a Lunatic, (1845) 1 Barb. Ch. 38, 5 N. Y. Ch. Rep. (L. ed.) 290, was another action to determine lunacy and appoint a committee. The court held that while

reasonable notice should be given *personal service upon the alleged lunatic was not necessary.* (l. c. 291.) There are many more New York cases of a similar nature, the more recent of which had under consideration a nonresident statute similar to the Texas statute. *In re Dalrymple,* 163 N. Y. S. 233, and *In re Ryan,* (1943) 40 N. Y. S. (2d) 594. *In re Paddock,* (Ct. App. N. Y., 1912) 97 N. E. 1111, attacked the nonresident statute on the ground that it violated the State and Federal Constitutions. *The constitutionality of the statute was upheld.*

New Jersey likewise followed the common law. *In the Matter of Child,* 16 N. J. Eq. 498; *In re Devausney,* 56 N. J. Eq. 502, 28 Atl. 459. In the *Devausney* case the jurisdiction of the court to institute proceedings de lunatico inquirendo was challenged on the ground that, although the lunatic had real and personal estate in New Jersey, she was a citizen and resident of New York. (1 c. 459) This case has an excellent discussion of the early cases in this country and also of the English case of *Ex parte Southcote, supra.* After discussing these cases the court said:

> "This examination of the law and case, in my judgment, demonstrates that *In re Southcote* is an authority for issuing a commission when the alleged lunatic is nonresident, if he or she owns an estate within the jurisdiction. * * *" (2 c. 460)

The New Jersey cases are of special significance for the reason that the New Jersey nonresident statute provides that prior to the appointment of a New Jersey guardian by the Orphans Court there must be an adjudication of insanity in the state of the insane person's residence; but nevertheless the above cases hold that the Court of Chancery has an inherent power to protect the property of insane persons and, in those cases where a nonresident has not been

declared insane in the state of his residence, a court of chancery may intervene to determine such insanity and appoint a guardian of his estate.

The courts of Delaware likewise have passed upon this question. *In re Wilson,* (Ct. of Chan. of Dela., 1912) 82 Atl. 695, adjudicated a nonresident to be a person of unsound mind and appointed a guardian of his estate *on out of state service.* The court said:

> "It is clearly settled that a court of chancery has, *independent of statute,* jurisdiction to issue a commission de lunatico inquirendo respecting a person who has real estate within the jurisdiction of the court, though he be a nonresident. * * *" (1 c. 696)
>
> * * * * * * * *
>
> "So also *as to the matter of notice* to the alleged lunatic, which, of course, is very important. Inasmuch as there is no rule or statute prescribing the form or method of giving notice it can be given in such way that the chancellor will be sure that the supposed lunatic, if in such condition that a notice will be proper and useful, has knowledge of the proceeding, *though living in another jurisdiction.*" (2 c. 696)

The Supreme Court of Washington had this question before it in *Coleman* v. *Cravens, et al.,* (1905) 41 Wash. 1, 82 Pac. 1005, and, in sustaining a determination of insanity and the appointment of a guardian of the estate of a nonresident on *publication notice,* the court said:

> "* * * This application falls under Section 5 of said act, and the *notice by publication* is manifestly the only notice required in such cases. * * *" (1 c. 1006)

In each of the cases cited below *it was held that a nonresident could be determined to be insane for the purpose of appointing a guardian of his estate.* In many cases the

type of notice is shown, but even where not shown it had to be constructive, since in each case the insane person was outside the state and personal service of process was impossible. *In re Sall,* 59 Wash. 539, 110 Pac. 32 (*publication notice*); *Hundley* v. *Sumrall, et al.,* 144 Ky. 73, 137 S. W. 842 (*notice by mail*); *McCormick* v. *Blaine,* 345 Ill. 461, 178 N. E. 195 (*notice by publication and mailing*); *Wallace* v. *Tinney,* 145 Ia. 478, 122 N. W. 936 (*no notice necessary*); *In re Edgerly,* 82 Minn. 96, 84 N. W. 653 (*notice by mailing*); *Appeal of Karmany,* 242 Pa. 300, 89 Atl. 84; *Griffin* v. *Larwell,* 148 Mich. 516, 111 N. W. 1089; *In re Hendrickson,* 40 S. D. 211, 167 N. W. 172 (*constructive notice*); *Crohn* v. *Modern Woodman of America,* 145 Mo. App. 158, 129 S. W. 1069 (Secs. 386 and 482 Mo. Stats. Ann., require "reasonable notice" in such cases); *Coker* v. *Gay,* 154 Ga. 337, 114 S. E. 217; *Henderson* v. *Shell Oil Company, Incorporated,* (Tex. Sup.) 202 S. W. (2d) 492 (R. 89, 92) (*constructive notice is sufficient*); *Finley* v. *Hartsook,* (C. C. A. 5) 158 F. (2d) 618 (*in rem action. Personal service not necessary*); *Josephberg, et al.,* v. *Markham,* (C. C. A. 2) 152 F. (2d) 644 (*living in Italy*). Even before the passage of the statute providing for the appointment of guardians for nonresidents the Supreme Court of Texas held that under the Constitution the courts of that state had jurisdiction to appoint such guardians. *Neal* v. *Bartleson,* 65 Tex. 478.

> "*Insanity Is Not a Status.* If insanity is found at the domicile it does not affect the condition of the person in another state; if he is to be treated as insane in the other state, he must there be found insane. So a person found sane at his domicile may be found insane in another state. *A person may be declared insane in a state not his domicile, and there put under guardianship.*" Conflict of Laws by Beale, Vol. 2, page 658, Sec. 120.9.

"* * * But the power of chancery courts, in the absence of statutory provisions on the subject, *to institute proceedings de lunatico inquirendo* in the case of *nonresident persons* of unsound mind, *and to appoint guardians* to them after inquisition, is well established in England and America, provided that such person has real or personal estate within the jurisdiction of the court. * * * No committee can be appointed of the person of a non-resident, but a committee may be appointed to administer a non-resident's property." The American Law of Guardianship by Woerner, p. 441, Sec. 134.

See also: Rights, Remedies and Practice, by Lawson, Vol. 2, Sec. 848, "Guardians of Lunatics," and American and English Enc. of Law, Vol. 16, pp. 577-578, Sec. 9.

On the question of whether it first must be adjudicated that a nonresident is incompetent, the author, in 14 R. C. L. 570, Sec. 21, says:

"* * * So it has been declared that while the fact of the insanity of a non-resident for the protection of whose property the appointment of a guardian is sought must be judicially determined, this may be done on the hearing of the application for the appointment of the guardian, and need not be determined in an independent proceeding."

See also, 32 C. J. 653, and 25 Am. Jur. 21.

By case law or by statutes most of our states have followed the common law and provide for the appointment of guardians of the estates of nonresident persons of unsound mind upon constructive notice, and, as an incident thereto, for a determination of insanity. *In no case has the highest court of any state held that such appointment could not be made on constructive notice under proper statutory authority,* and several courts have held the insanity of a non-

resident can be determined and a guardian appointed *on constructive notice* even in the absence of express statutory authority. *Ex parte Southcote,* (England) 1 Amb. 109; *Re Ganse, a Lunatic,* 9 Paige 416, 4 N. Y. Ch. Rep. (L. ed.) 756; *In the Matter of Child,* 16 N. J. Eq. 498; *In re Wilson,* 9 Del. Ch. 332, 82 Atl. 695; and *Coker* v. *Gay,* 154 Ga. 337, 114 S. E. 217.

In his argument petitioner cites cases from eleven different jurisdictions. *Nine of these jurisdictions have nonresident statutes similar to Texas. These statutes provide for the appointment of guardians or custodians of the estates of nonresident persons of unsound mind without requiring personal service of process.*[1] The two states that do not have a statute similar to the Texas nonresident statute are Louisiana and West Virginia, and the cases cited from these states are not in point on the constitutional question here involved. Most states have two sets of guardianship statutes—one set relating to guardians of *resident* minors and persons of unsound mind, *which expressly require personal service of process;* and another set relating to the appointment of guardians of the estates of *nonresident* minors and persons of unsound mind, which statutes provide for constructive notice. Not a single nonresident statute of any state in the United States provides for personal service. Six of the cases cited by petitioner involve appointments of guardians for *residents* under statutes *expressly providing for personal service of process.* These cases merely hold that *where required by statute* such personal service is necessary. Only two of petitioner's cases involve the appointment of a guardian of the *estate of a*

1. Article 4132, *Tex.* Rev. Civ. Stat.; Code of *Iowa* 1939, Sec. 12605; *Cal.* Code of Civ. Procedure 1923, Sec. 1793; 58 *Okla.* Stats. 1941, Sec. 861; *Alaska* Code, Sec. 911; Sec. 59-1803, 1947 Supp. to Gen. Stats. of *Kansas* 1935; *Pa.* Stats. 1920, Sec. 14367; *Minn.* Stats. 1941, Sec. 525.55; *District of Columbia*—Cooper v. Burton, 127 F. (2d) 741 (2 c. 742).

nonresident person of unsound mind. Those two cases are *Redmon* v. *Leach,* (Civ. App. Dallas, Tex.) 130 S. W. (2d) 873, and *Grinbaum* v. *Superior Court,* 192 Cal. 548, 221 Pac. 635. *Redmon* v. *Leach* was repudiated by the Supreme Court of Texas in the case at bar. The California nonresident statute involved in *Grinbaum* v. *Superior Court* provided for *such notice as the "court deems reasonable."* The court merely held that such statute required some type of notice and that the appointment of a guardian *without any notice whatever* was invalid. That case is not applicable here because the Supreme Court of Texas has held that notice in the case at bar was properly given under the Texas statutes. *Petitioner's cases are more fully discussed in an appendix to this brief.*

Point III.

Upon the filing of the petition for the appointment of a guardian the County Court of Clay County, Texas, acquired jurisdiction of petitioner's Texas estate.

Under Specification of Error B (brief 17) petitioner asserts that for a constructive service to be sufficient there must be a prior seizure of his property. Petitioner overlooks the fact that *upon the filing of the petition for guardianship the County Court obtained jurisdiction of petitioner's property within the State of Texas. Wootters* v. *Wynne,* (Civ. App. Tex.) 7 S. W. (2d) 940 (no writ), involved an application for appointment of a guardian for a person of unsound mind. After the application had been filed, but before it had been passed upon, the County Court of Houston County declared Eastham insane and appointed a guardian on a complaint filed subsequent to the filing of the complaint in Walker County. In holding that the County Court of Walker County, in which the first complaint was filed,

acquired jurisdiction of the insane person's estate upon the filing of such complaint, the court said:

> "The purpose of Mrs. Jones' application was to *subject the property of W. A. Eastham's estate to the custody and control of the probate court of Walker County, and its jurisdiction attached when such application was filed,* • • • The Walker County Court having first acquired *jurisdiction of the property* belonging to the estate of W. A. Eastham by the due commencement of a proceeding, which it was empowered to adjudicate, *and which sought to have the court seize and exercise dominion over such property,* it was entitled to exercise its jurisdiction without interference from any other court of co-ordinate jurisdiction, • • •." (2 c. 941)

Identical contentions were made by the petitioner in *Cunnius* v. *Reading School District,* 198 U. S. 458, 49 L. ed. 1125, discussed above. In that case *it was contended* that under *Pennoyer* v. *Neff,* 95 U. S. 714, 24 L. ed. 565, first, *personal service was necessary* before appointing an administrator for a living absentee, and, second, the *publication notice* provided for by the statute *was insufficient under the Fourteenth Amendment*: "• • • for the reason that there was *no seizure of plaintiff's property* into the custody of the court prior to the rendition of the decree • • •." *It was further contended* that, "It follows, therefore, that for want of personal notice to the plaintiff, and *in the absence of the required seizure of her property,* the proceeding under the Act of 1885 was void as to her, • • •." (2 c. 49 L. ed. 1126.) *In overruling both these contentions* and in holding that the *publication notices* provided for by the statute were sufficient, this Court said:

> "• • • So far as the notices which it directs to be issued, we think they were reasonable. • • •" (p. 477)

Conclusion.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

GEO. W. CUNNINGHAM,
Box 1191,
Tulsa 2, Oklahoma,
Attorney for Respondent, Shell Oil Company, Incorporated.

Of Counsel:

JNO. E. KILGORE,
510 Gulf States Building,
Dallas 1, Texas;

JESSE M. DAVIS,
Box 1191,
Tulsa 2, Oklahoma.

APPENDIX.

Petitioner's Authorities Do Not Support His Contention.

Pennoyer v. *Neff*, 95 U. S. 714, 24 L. ed. 565, merely holds that a personal judgment by an attorney for services rendered could not be obtained against a nonresident upon constructive service of summons by publication in an action where he did not appear. Therein this Court expressly recognizes the validity of constructive service of process *in actions in rem or quasi in rem.* What constitutes seizure of property is discussed under Point III, *supra.*

Redmon v. *Leach*, (Civ. App. Dallas) 130 S. W. (2d) 873: In his brief petitioner asserts that the Supreme Court of Texas expressly approved the holding of the Court of Civil Appeals in *Redmon* v. *Leach*, but such is not the case. Regardless of whether the Texas statute is or is not constitutional, the correct result was reached in the *Redmon* case, since an attempt was being made to deprive Redmon, *a sane person*, of her property by having her declared insane. In addition to the constitutional question the court found the posted notice was insufficient and that *in fact Redmon was not a person of unsound mind.* The Supreme Court of Texas in denying a writ of error did not approve the questions of law decided by the Court of Civil Appeals, but merely held that it had rendered a correct judgment. The San Antonio Court of Civil Appeals in *In re Burges' Estate*, 148 S. W. (2d) 903 (no writ), and the Fort Worth Court of Civil Appeals in the case at bar, *Hugh Henderson* v. *Shell Oil Company, Incorporated, et al.*, 202 S. W. (2d) 492 (R. 72, 76), each refused to follow the *Redmon* case and the Supreme Court of Texas likewise refused to follow the Redmon case in the case at bar. (R. 89)

The type of notice required in a guardianship proceeding is entirely dependent upon the statute under consideration. In nearly every state there are two sets of statutes. One set relates to the appointment of a guardian for a *resident* person of unsound mind, and for the most part *these statutes require personal service of process* upon the alleged insane person. The other set of statutes relates to the appointment of a guardian for a *nonresident* minor or person of unsound mind, and in some instances for a resident minor or person who is absent from the state. *Without exception these statutes either do not require notice or provide for constructive notice.* The reason is obvious. Constructive service is a creature of necessity and, except in rare instances, it would be impossible to procure personal service on a nonresident person of unsound mind. In considering each case it must be determined whether the statute being construed expressly provides for personal service of process or permits constructive notice.

Many of the cases cited by petitioner involve cases construing statutes which *expressly require personal service. Raher* v. *Raher,* 150 Ia. 511, 129 N. W. 494, upon which petitioner so strongly relies, is this type of case. *It construes a resident statute which expressly requires personal service.* Under that statute an attempt was made to obtain *personal service on a resident* while out of the state. *The court held such service was not authorized by the statute.* On the other hand, *Wallace* v. *Tinney,* (1909) 145 Ia. 478, 122 N. W. 936, involved the Iowa nonresident statute. Therein the Supreme Court of Iowa, in approving the appointment of a guardian of the Iowa estate of a resident of Oregon who was of unsound mind, held that such action was *in rem* and that such appointment *could be made without notice.* The court said:

"* * * The exhibits referred to are the application

for appointment, the report of the guardian, and the order of court thereon, and the order appointing the guardian. These do not show that no notice was given. But we do not think that either the statute or any rule of constitutional law requires the giving of notice of an application for the appointment of a guardian of the property of a nonresident. Surely our statute does not require any notice, and, if it be required, it must be in virtue of some general rule of law or constitutional requirement. Doubtless no guardian may be appointed for the person of another without notice, and this is what the cases for appellant seem to hold. * * *" (1 c. 938)

Petitioner attempts to avoid *Wallace* v. *Tinney* on the ground the opinion in the *Wallace* case was prior to the opinion in the *Raher* case. In making this argument petitioner overlooks these facts: (*1*) The cases construe two separate and distinct statutes—the resident statute, which requires personal service, and the nonresident statute, which does not require personal service, and (*2*) the personnel of the court handing down the decision in the *Wallace* case was identical with the personnel of the court handing down the decision in the *Raher* case. The same Iowa statute covers both nonresident minors and persons of unsound mind and as late as 1941 the Supreme Court of Iowa again had this nonresident statute before it in approving the appointment of a guardian for a minor resident of Texas who was in Nebraska when the application for guardianship was made. *In re Skinner's Guardianship,* 230 Ia. 1016, 300 N. W. 1. While the type of service is not shown, it had to be out of state. In this case the court held the lower court was without jurisdiction to appoint a guardian of the nonresident's person *but affirmed the appointment of a guardian of his estate.* Both the statute and case law of Iowa refute petitioner's contention.

Grinbaum v. *Superior Court*, 192 Cal. 528, 221 Pac. 635: Petitioner's quotation from this case must have been taken from some digest, since we fail to find all of his quotation in the opinion as reported in the Pacific Reporter. A part of it will be found in column 1, page 646. Although the last sentence of this quotation is shown as a part of the previous paragraph, it is not so shown in the opinion. This case involved the appointment of a guardian for an insane *resident* of California who was in Germany at the time. *No notice of any kind was given.* In stating that it was not necessary to decide whether the action was in personam or in rem and whether a substitute notice would be sufficient, the Supreme Court of California said:

> "* * * In so doing *we do not deem it necessary to determine* whether proceedings for the appointment of guardians of the estates of insane or incompetent persons are proceedings in personam or in rem; * * *, *the question here is not as to the form or sufficiency of the notice, but is as to whether or not any notice whatsoever was given,* or is to be presumed to have been given; * * *." (1 c. 641)

A reference to that portion of the opinion quoted in petitioner's brief reveals that the court was discussing two different sections of the statute. In the first part of the quotation it discusses Section 1763, which provides for *personal service* of notice where *residents* within the state are involved. The court then states:

> "Section 1793 of the Code of Civil Procedure provides for the appointment of guardians of *insane* or incompetent persons *who reside or are without the State* of California. * * *." (1 c. 640)

That is the reason the court in the quotation cited in petitioner's brief states that personal service is required under

Section 1763 (the resident statute), but that *"a similar strictitude cannot be practicably enforced in the case of alleged insane or incompetent persons who reside without* or are absent from *the state* lies in the nature of things, but does not in any degree diminish the importance of giving the notice required by Section 1793 of the Code of Civil Procedure." (1 c. 646) *The notice required by Section 1793 is not personal notice, but is such notice as the "court deems reasonable."* In other words, the *Grinbaum* case holds that *by statute* personal service is necessary where a resident within the state is involved, but that where a resident is absent from the state or a nonresident is involved, "a similar strictitude cannot be practicably enforced" (that is, personal service) and therefore Section 1793 is applicable. Section 1793 is shown in full in column 1, page 640 of the *Grinbaum* case. *This section applies alike to the appointment of a guardian for a nonresident minor or insane person, and the same notice is required in each case.* In *Gronifer* v. *Puymirol,* 19 Cal. 629, the Supreme Court of California approved the appointment of a guardian for an infant citizen and *resident of France,* and held that *service by publication for five days complied with the nonresident statute.* Both the statute and case law of California refute petitioner's contention.

In re Allie Walters Sacks, (Cal.) 190 P. (2d) 602, and *Sacks* v. *Superior Court,* 79 Cal. App. (2d) 806, 180 P. (2d) 922: Petitioner in his brief erroneously states that these two cases hold that an insanity hearing based on foreign service and publication service is insufficient and the entire proceedings are null and void because of lack of personal service (brief 25). *Neither case so held.* The same incompetent was involved in each case. *These cases involved the resident statute above referred to.*

McElroy v. *Pegg,* (C. C. A. 10) 167 F. (2d) 668: This is a case similar to the Iowa case. *It involves a resident statute expressly providing for personal service.* It will be noted from the quotation in petitioner's brief that 58 Okla. Stats. 1941, Sec. 851, expressly provides that *where a resident is involved notice* of the time and place of the hearing for the appointment of a guardian for a person of unsound mind *must be personally served.* Under such statute a proceeding had without such personal service is invalid. The Oklahoma cases cited in the quotation from the *McElroy* case all merely hold that *under this statute* personal service is necessary. On the other hand 58 Okl. Stats. 1941, Sec. 861, relates to the appointment of guardians for *nonresident* minors and *persons of unsound mind, and provides for notice "in such manner as the judge orders."* Again we find that in Oklahoma, like in California and Iowa, personal service is required where a resident within the state is involved, but that *where a nonresident is involved constructive service* may be had in such manner as the judge orders. While Section 861 has not been construed by the Oklahoma courts, Section 761, which relates to the appointment of guardians of minors, provides for "such notice as he (the judge) deems reasonable." Under this section it has been held that *personal notice is not necessary,* but only such notice as the county judge deems reasonable. *Jones* v. *Prairie Oil & Gas Co.,* 273 U. S. 195, 45 Sup. Ct. 338, 71 L. ed. 602, *supra; Hawkins* v. *Tiger,* 163 Okl. 55, 20 P. (2d) 578; *Ross* v. *Wilson,* 95 Okl. 262, 218 Pac. 682.

Martin v. *White,* (C. C. A. 9) 146 Pac. 461: Petitioner's quotation from the opinion in this case is confusing. We are unable to find the first paragraph of his quotation anywhere in the opinion. The second paragraph appears to be the third paragraph of the syllabus in the Federal

Reporter, and the third paragraph appears to be the fourth paragraph of the syllabus in the Federal Reporter. It is probable that petitioner merely intended the first paragraph as a statement of the facts in the case and that the printer erroneously quoted it. Again we find petitioner confusing the statute applicable to residents with the statute applicable to nonresidents. Section 896 cited in the last paragraph of petitioner's quotation is quoted in the opinion of the court (p. 463). This section provides for the appointment of a guardian for a *resident* insane person after "notice to be given to the supposed insane person of the time and place appointed for hearing the case, not less than ten days before the time so appointed; * * *." (p. 463) In its opinion the court said:

> "From a careful examination of the various sections of the Code of Alaska, it plainly appears that the *validity* of the proceedings had in the present case before the commissioner *must be determined by the provisions* of Sections 895 and 896. * * *" (p. 464),

and then held:

> "* * * There was *no notice* given to White *in compliance with the provisions of the statute* under which the commissioner acted. *The 'public notice'* of the time and place of the hearing in a newspaper, or by posting a similar notice in three public places in the town of Fairbanks, *was not such a notice as the statute requires.* * * *" (p. 465)

The only question before the court in the *Martin* case was whether the personal service provided for in the case of a resident insane person had been given. On the other hand, Section 911 of the Alaska Code, quoted in full at page 463 of the court's opinion, provides for the appointment of a guardian for minors and *other persons* residing *without* the District, but who have estates therein *"after notice to all*

*persons interested, to be given in such manner as the Commissioner shall order * * *.*" Alaska, like California, Iowa, Oklahoma, and numerous other states provides for personal service of process where a resident is involved, but for some type of constructive notice where a nonresident is involved.

Evans v. *Johnson,* 39 W. Va. 299, 19 S. E. 623: This is another case where an attempt was made to appoint a committee for a *resident insane person without any notice whatever* to him. The case is based entirely upon an interpretation of a statute as shown from the following quotation:

> "* * * In *Lance* v. *McCoy,* 34 W. Va. 416, 12 S. E. 728, the opinion is expressed that such an appointment by a County Court *without notice, as required by Code,* c. 58, Sec. 34, is void. A re-examination of this question in this case has confirmed me in the view then expressed. * * *" (2 c. 623)

The question before the court was whether an appointment could be made *without notice* in the face of a statute requiring notice.

Cooper v. *Burton,* (Ct. App., D. C.) 127 F. (2d) 741: This case merely held that the District Court of the District of Columbia could not adjudicate the mental condition of a lunatic residing in New Jersey, *for the purpose of controlling properties located in New York.* The court expressly found that a receiver or custodian of the property of the incompetent located in the District of Columbia could be appointed. In this connection the court said:

> "* * * *Doubtless it is true that the courts of the District have power to grant protection to property of insane persons, wherever they may be at a particular time, if the property itself is located in the District of Columbia, but protection of property is not the object of this petition. Appellants are not interested in ob-*

taining the appointment of a receiver or custodian of the small amount of Mrs. Coopers property in the District of Columbia. They are seeking an adjudication of insanity and the appointment of a committee for the purpose of controlling properties located in New York, and this character of relief the courts of the District may not grant in the absence of personal service in the District of Columbia." (1 c. 743)

On rehearing the court expressly states there is nothing in the opinion foreclosing the appointment of a receiver or custodian of Mrs. Cooper's property in the District of Columbia. (2 c. 743) That is what happened in the case at bar. *The Texas guardianship was limited to petitioner's property within that state.*

Morrissey v. *Rodgers,* 137 Kan. 626, 21 P. (2d) 359, involved the question of whether a guardian of an insane person appointed by a Nebraska court was entitled to certain personal property located in Kansas. The Supreme Court of Kansas merely held that the trial court committed error in refusing to admit evidence on the question of whether the incompetent was a resident of Nebraska, since if he was not a resident of that state the appointment of a guardian *over his person* would be invalid. *No attack was made on the appointment of a guardian of his estate.*

Beeler v. *Beezley,* 126 Kan. 268, 267 Pac. 1112, involves the *interpretation of a Kansas statute* which limited the jurisdiction of the probate courts of that state in appointing guardians *"to anyone in its county."* The court merely held that *under such statute* the probate court did not have jurisdiction of *any person outside the county* in a guardianship proceeding. *Federal Trust Co.* v. *Allen,* 110 Kan. 484, 204 Pac. 747, is a Kansas case which was cited by petitioner below, but which has been omitted here for the reason, no

doubt, that this case approves a Nebraska appointment of a guardian of an insane person *on constructive notice.* The Nebraska appointment which was held valid by the Supreme Court of Kansas was based on *publication notice and out of state service.* In this connection the court said:

> "* * * *Notice* as provided by the statutes of Nebraska was given *by publication* to all persons interested, and a certified copy of the *notice was delivered* to Emily J. Weston on November 25, 1920, at the home of her stepson *in El Dorado, Kan.* * * *." (1 c. 748)

Prior to 1939 the Kansas nonresident statute provided that a guardian for a nonresident incompetent may be appointed only where he "has been adjudicated incompetent in the state of his residence," (Sec. 39-241 G. S. 1935) and in *Henry* v. *Edde,* (1938) 148 Kan. 70, 79 P. (2d) 888, the Supreme Court of Kansas held there was *no statutory authority* in Kansas for the appointment of a guardian for a nonresident incompetent prior to his adjudication as an incompetent in the state of his residence. In spite of the above statute Mr. Justice ALLEN wrote a vigorous dissenting opinion wherein he took the position that even in the absence of a statute the District Courts of Kansas had the inherent power to appoint a guardian of the estate of a nonresident incompetent. In this connection he said:

> "* * * Ordinarily one would expect to go to the probate court to appoint a guardian, but *our statutes* relative to probate courts *do not cover the situation of a non-resident, actually incompetent, but who has not been so adjudged,* owning property in this state, and our decisions clearly indicate the non-existence of a remedy for the situation in the probate court. Under such circumstances, the District Court with its inherent equitable powers over the estate of incompetents is the only forum to which resort may be had.

"It would be an astonishing hiatus in the law if real and personal property in this state, belonging to a non-resident incompetent, could not be protected from waste and spoilation.

"There is no doubt equity has full and complete jurisdiction over the persons and property of incompetents, where the jurisdiction has not been taken away by the statute." (2 c. 894)

The Legislature of Kansas hastened to correct this *"astonishing hiatus in the law"* and repealed the above section of the Kansas statute by a new probate code passed in 1939, *one year after the above opinion.* The new code omits the requirement that an incompetent must first be adjudicated as such in the state of his residence before a Kansas guardian may be appointed. Section 59-1803, 1947 Supp. to G. S. Kan. 1935. This statute not only is broad enough to include nonresident incompetents, but it expressly provides that a guardian may be appointed for a nonresident person of full age in the state of his residence providing he is a minor under the laws of the State of Kansas. There can be no question but that under the 1939 statute a probate court in Kansas may appoint a guardian of the estate of a nonresident infant or incompetent regardless of whether he has been so adjudicated in the state of his residence. No Kansas case can be cited as holding that an act similar to the Texas act under consideration is unconstitutional.

Hansell v. *Hansell,* (1892) 44 La. Ann. 548, 10 So. 941, is another case that must be considered in the light of the statutes being interpreted. When so considered, it supports our contention. The *Hansell* case did not involve the appointment of a guardian, but rather an action for the partition of certain land and the *appointment of a curator ad hoc.* The court held that under the laws of Louisiana a

curator ad hoc could not be appointed for an insane person prior to the time he had been interdicted, but that he must be presumed sane until he had been declared otherwise by a proper court in the state of his residence. Nevertheless, the partition sale was upheld on the ground that the alleged insane person was an absentee and, under the Louisiana law, *the curator ad hoc was properly appointed* on that ground regardless of whether he was sane or insane. If the Louisiana civil law rule be applied to Texas, Willard Gragg, petitioner's next friend, has no standing in this Court. The duties of a curator ad hoc are similar to those of a next friend or guardian ad litem, and *under the Louisiana rule the District Court of Clay County, Texas, was without jurisdiction to find that petitioner was a person of unsound mind for the purpose of appointing Willard Gragg his next friend in this case;* and since, unlike Louisiana, Texas does not have a statute providing for the appointment of a next friend for an absentee sane person, his appointment could not be supported on that ground. *Louisiana does not have a nonresident statute similar to the Texas statute.* As a matter of fact, in *State* v. *Servier,* (1914) 136 La. 45, 66 So. 392, the Supreme Court of Louisiana held that *the Louisiana statute* providing for the commitment of insane persons *did not include nonresidents within the state.* As evidence that the court based its decision on the statute rather than on any question of constitutional right, we quote the following language:

> "From the text of the law prescribing the form or order of commitment, *we think that the lawmaker intended to exclude nonresidents* and transients from the operation of the act. * * *" (pp. 392-393)

The Louisiana court does not purport to hold that a statute like the Texas statute would not be valid either under the

Constitution of Louisiana or the Federal Constitution. Both the Constitution and statutes of Texas provide for the appointment of guardians of nonresident persons of unsound mind.

McMullin v. *Commonwealth, etc.*, 261 Pa. 574, 104 Atl. 760, involved the interpretation of a Pennsylvania statute authorizing a guardian of a nonresident ward to remove property. In defining the issues the court said:

> "The issue as thus defined by the pleadings was a very narrow one, a pure question of law, and *confined to an inquiry as to the legislative intent* in the act of April 13, 1868, *supra*. * * *" (2 c. 761)

The Pennsylvania guardianship statute also applies to nonresidents. Pa. Sta. 1920, Sec. 14367. In *Appeal of Karmany*, 242 Pa. 300, 89 Atl. 84, the Supreme Court of Pennsylvania upheld the appointment of a guardian for a nonresident person of unsound mind who *was absent from the Commonwealth*, but had real estate therein. The type of notice is not shown, but *it necessarily was constructive.*

Minnesota v. *Probate Court*, 309 U. S. 270, 84 L. ed. 744, was an action for commitment of a person alleged to be a psychiatric personality. The constitutionality of the statute was upheld. *Minnesota has a nonresident statute similar to the Texas statute.* It provides, "notice shall be given in such manner and to such person as the court may determine." Minn. Sta. 1941, Sec. 525.55. The notice in *In re Edgerly*, 82 Minn. 96, 84 N. W. 653, was by *mail.*